

STATE OF MICHIGAN
IN THE SUPREME COURT

JUSTINE MALDONADO,

Plaintiff-Appellee and
CrossAppellant,

-vs-

Supreme Court Case No. 126274
Court of Appeals No. 243763
Wayne Cir Ct No. 00-018619-NO

FORD MOTOR COMPANY,
and Daniel P. Bennett
Defendant-Appellant and
Cross Appellees

26274(157)
XAK
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25853
SCHEFF & WASHINGTON, P.C.
George B. Washington (P-26201)
Miranda K.S. Massie (P-56564)
Counsel for Plaintiff-Appellee
65 Cadillac Square, Suite 3800
Detroit, Michigan 48226
313-963-1921

KIENBAUM, OPPERWALL,
HARDY & PELTON, P.L.C.
Elizabeth Hardy (P-37426)
Julia Turner Baumhart (P-49173)
Counsel for Defendant-Appellant
325 South Old Woodward Avenue
Birmingham, Michigan 48009
248-645-0000

FORD MOTOR COMPANY
Robert W. Powell (P-34127)
Co-Counsel for Defendant-Appellant
Three Parkland Blvd.
1500 Parkland Towers West
Dearborn, Michigan 48126
313-621-6402

Patricia J. Boyle (P-11084)
Of Counsel to Kienbaum, Oppertwall,
Hardy & Pelton, P.L.C.
325 South Old Woodward Avenue
Birmingham, Michigan 48009
248-645-0000

**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO THE DEFENDANT-
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

and

PLAINTIFF-APPELLEE'S CROSS APPLICATION FOR LEAVE TO APPEAL

FILED

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JUDGMENT AND ORDERS APPEALED FROM AND RELIEF SOUGHT

Defendant-appellant Ford Motor Company applies to this Court for leave to appeal from the unpublished opinion of the Court of Appeals issued April 22, 2004 (Ford Appendix, Ex A), reversing the Wayne County Circuit Court's August 21, 2002 Order Granting Dismissal With Prejudice (Ford Appendix, Ex B) and September 5, 2002 Order Excluding the Testimony of "propensity" Witnesses (Ford Appendix, Ex C).

The plaintiff-appellee agrees that this Court has jurisdiction over this application for leave as it is filed within 42 days of the Court of Appeals' filing of the April 22, 2004 opinion that is the subject of this application.

For the reasons stated in this Brief, the plaintiff-appellee submits that this Court should deny this application.

In the event that this Court should grant any aspect of Ford's application, the plaintiff-appellee applies for leave to cross appeal from the unpublished Opinion of the Court of Appeals insofar as it: (1) failed to reverse in total the September 5, 2002 Order Excluding Testimony of "Propensity" Witnesses; and (2) affirmed the Wayne County Circuit Court's Orders of February 16, 2001 Granting Defendants' Joint Motion in Limine to Exclude Unrelated Prior Crime, Wrong or Act.

This Court has jurisdiction over this application for leave to cross appeal pursuant to MCR 7.302(d)(2).

STATEMENT OF QUESTIONS PRESENTED

I

Did the circuit court err in dismissing this case for extrajudicial statements by plaintiff, by her counsel, or by third parties, where there is no evidence that any of those statements violated any applicable standard of conduct?

The Court of Appeals did not address the question.

The circuit court answered “No.”

The plaintiff answers “Yes.”

The defendant Ford Motor Company answers “No.”

II

Did the Court of Appeals properly determine that the circuit court abused its discretion in dismissing this case based upon extrajudicial statements by the plaintiff or her attorneys under a standard that was unconstitutionally vague?

The Court of Appeals answers “Yes.”

The circuit court answered “No.”

The plaintiff answers “Yes.”

The defendant Ford Motor Company does not address the question.

III

Did the Court of Appeals properly determine that the circuit court abused its discretion by dismissing this case based upon extrajudicial statements by the plaintiff or her attorneys without conducting a hearing or making any finding on whether those statements had prejudiced Ford’s right to a fair trial in any way?

The Court of Appeals answers “Yes.”

The circuit court answered “No.”

The plaintiff answers “Yes.”

The defendant Ford Motor Company answers “No.”

IV

Did the Court of Appeals properly find that the circuit court had abused its discretion when it excluded evidence establishing that Ford had known of and done nothing about sexual harassment that Daniel Bennett, a superintendent for Ford, had perpetrated upon five other employees at the Wixom plant because that evidence was probative of the hostility of the environment in which Maldonado worked and of Ford's respondeat superior liability for that environment?

The Court of Appeals answered "Yes."

The circuit court answered "No."

The plaintiff answers "Yes."

The defendant Ford Motor Company answers "No."

V

In the event that this Court should accept review on the evidentiary issues, did the circuit court abuse its discretion by excluding evidence establishing that Ford had known of and done nothing about sexual harassment that Daniel Bennett, a superintendent for Ford, had perpetrated upon five other employees at the Wixom plant when that evidence was offered for other purposes?

The Court of Appeals did not reach the issue.

The circuit court answered "No."

The plaintiff answers "Yes."

The defendant Ford Motor Company answers "No."

VI

In the event that this Court should accept review on any issue in this case or on a related evidentiary issue in another case pending before this Court, did the Court of Appeals improperly refuse to reverse the circuit court's order excluding evidence that Ford had known of and done nothing about the fact that Daniel Bennett, a superintendent for Ford, had used Ford's car to stalk and expose himself to three high-school girls while test driving the car on I-275?

The Court of Appeals majority answered "No."

Judge Helene White answered "Yes" and remanded this issue for reconsideration.

The circuit court answered “No.”

The plaintiff answers “Yes.”

The defendant Ford Motor Company answers “No.”

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INTRODUCTION

Ford Motor Company asks this Court to review and reverse an unpublished opinion by the Michigan Court of Appeals remanding this matter to the Wayne County Circuit Court for a hearing to determine whether the pre-trial publicity of which Ford complains tainted the jury pool in any way. In the name of a fair trial, Ford asks this Court to deny any trial to the plaintiff—without benefit of any determination as to whether Ford’s right to a fair trial has been compromised in any way.

As will be seen, neither Ford nor the co-defendant Daniel Bennett *ever* filed a formal motion seeking an order to restrain *any* of the public statements by counsel or by the plaintiff that they now claim warrant summary dismissal of this action. Rather, in the absence of such an order—or even a motion for such an order—Ford moved and the circuit court ruled that the action should be dismissed based upon a retroactive determination that certain statements spread over the preceding eleven months were supposedly designed to prejudice Ford’s right to a fair trial.

In its 48-page application, Ford has failed to cite a *single* case from *any* jurisdiction that has *ever* approved such a procedure in a case that involved rights claimed under the First Amendment. See Ford App, at 22-26. Instead of law, Ford “supports” its application with an extraordinary stream of invective directed at plaintiff or her counsel accusing either or both of “intransigent,” “premeditated,” “flagrantly abusive,” “repeated,” “blatant,” “egregious,” and “widespread” misconduct,” of being “untruthful,” of attempting to “tamper with the administration of justice,” and of operating with “sinister” objectives—even adding an unspecified and irrelevant claim that counsel did

the same thing in another case (Ford App, at 1, 11, 20, 21, 26, and *passim*).¹ On this “basis,” Ford asks this Court to reverse the Court of Appeals because it applied “technical rules and constraints that do not, and cannot, govern an extraordinary situation such as this” (Ford App, at 2).

As will be seen, the “technical rules and constraints” that Ford asks this Court to ignore are decisions of the Supreme Court of the United States defining when and by what procedures the government may regulate speech otherwise protected by the First Amendment. But before even reaching those precedents, the *premise* of Ford’s argument is totally without merit, because neither the plaintiff nor her attorneys engaged in any misconduct at all.

Beginning with Ford’s charges against the plaintiff, Ford has an obligation to specify what standard of conduct she supposedly violated—and thus how her conduct suddenly became “*misconduct*.” Like the circuit court Ford claims that Maldonado violated Rule 3.6 of the Michigan Rules of Professional Conduct and an admonition of the circuit court that incorporated that Rule of Conduct (Ford Appendix, Ex B, Cir Ct Op, at 6-7; Er R, Tr 6/21/2002, at 30(quoted *infra* at 15),² But Ford does not even cite, much less provide a reason to reverse, the finding of the Court of Appeals that neither Rule 3.6 nor the admonition incorporating that rule *even applied to statements made by persons who are not attorneys* (Ct App Op, at 8-9).

¹ In fact, in the forty years of practice by the plaintiff’s attorneys, none has ever been found guilty of any form of professional misconduct in this or any other state.

² “Ford Appendix” refers to the Appendix that Ford submitted in support of its application to appeal. Where possible, plaintiff has cited to the exhibits in this document rather than reproducing the same documents in a separate appendix.

Ford fares no better in its claims that plaintiff's counsel committed acts of misconduct. Contrary to the repeated assertions in Ford's brief that the Court of Appeals found that plaintiff's counsel committed some act of misconduct (Ford App, at 21, 26, 28), the Court of Appeals did *not* enter *any* finding as to whether there was or was not any misconduct by counsel (See Ct App Op, at 4-7). But if the Court of Appeals found it unnecessary to rule on that issue, Ford fails even to disclose to this Court that the official body established by the state to regulate attorney's conduct—the Attorney Grievance Commission—*did* render a finding on these issues and dismissed all charges asserting that any of counsel's statements in this case violated Rule 3.6 (see Pl App, Ex C). As will be seen from a careful review of the law and the facts, Ford has provided no reason whatever for concluding that that finding is incorrect.

Having failed to establish its premise that there was misconduct by either the plaintiff or her attorneys, Ford next fails to establish that the procedures that the circuit court adopted were lawful means to deal with the misconduct that Ford claims to have occurred. As the Supreme Court has repeatedly held, the government may regulate speech by attorneys and by parties only by narrow and precise standards that provide maximum protection for the fundamental rights of free speech. *NAACP v Button*, 371 US 415 (1963)(striking down no-solicitation rule); *Gentile v State Bar of Nevada*, 501 US 1030 (1991)(striking down Rule 3.6); *Bridges v State of California*, 314 US 252, 260 (1941)(striking down ex post facto contempt citations based on extrajudicial statements). Ford not only ignores these precedents—it barely acknowledges the fact that the Court of Appeals *held in this case* that the circuit court had dismissed this action based upon a standard that was void for vagueness:

Because we find that the trial court abused its discretion by dismissal of this action prior to a full evidentiary hearing, we need not fully decide the issues of First Amendment rights raised by the plaintiff and amicus curiae ACLU *except to state that the trial court never issued an explicit order—written or oral—stating what speech was limited. Therefore, the trial court dismissed this matter under an unconstitutionally vague standard that conflicts with the due process requirements set forth in Gentile, supra.*

Ct App Op, at 6-7, n 3 (emphasis added).

Ford does not even attempt to provide a reason that this Court should disturb or even review that conclusion.

Furthermore, as suggested by the above quotation, the Court of Appeals found that it was not even necessary for it to rule upon numerous other constitutional challenges that the plaintiff and the ACLU made to the circuit court's decision. Among the other "technical rules and constraints" that Ford asks this Court to abandon is the principle that any court should not decide Constitutional issues where it is not necessary to do so—and that this Court should ordinarily decline to rule on issues that the Court of Appeals has not yet decided.

Ford's ancillary request for review of the Court of Appeals decision on the evidentiary issues is also without merit. As set forth in a detailed offer of proof submitted to the circuit court (Pl App, Ex D), the plaintiff offered testimony from five other women employed at Wixom that Ford had ignored their repeated complaints that Bennett, the supervisor who had severely harassed Maldonado, had exposed himself to, groped, forcibly kissed, and otherwise harassed them as well. In reversing the circuit court's pre-trial order excluding that evidence, the Court of Appeals held that the admission of this evidence was not a "close question" because the jury was entitled to consider the totality of the circumstances in determining (1) whether the environment that

Maldonado faced was sexually hostile and (2) whether Ford had taken reasonable steps to abate the hostility in that environment (Ct App Op, at 8-9). As this decision was solidly based in the holdings of this Court and in the unanimous decisions of the federal courts, there is no reason whatever for this Court to review the Court of Appeals decision on those issues.

Finally, if this Court were to review any issues in this case, it should review (1) the Court of Appeals' failure to rule on the circuit court's decision rejecting the other reasons that the plaintiff offered the testimony of those five women (on which the Court of Appeals did not rule), (2) the approval by two judges of the Court of Appeals of the circuit court's decision excluding evidence that Ford knew of and did nothing about the fact that Bennett's prior work-related use of a Ford production vehicle to follow and expose himself to high-school girls, and (3) the Court of Appeals decision affirming the circuit court's dismissal of the individual defendant Daniel Bennett.

Because this case has already been pending for over four years, Maldonado did not file an application for leave to appeal on those issues. In the event, however, that this Court should grant any aspect of Ford's application, she asks by cross application that this Court review those questions as well.³

STATEMENT OF FACTS AND PROCEEDINGS

As Ford's statement of facts and proceedings is inaccurate and incomplete, the plaintiff has no alternative but to set forth the relevant facts below.

As it is impossible to understand the publicity without first understanding the facts that gave rise to that publicity, she begins with a brief statement of Bennett's sexual

³ Maldonado has not appealed from the Court of Appeals decision dismissing Bennett as an individual.

harassment of her, then describes the totality of the hostile environment that Bennett created and that she was forced to endure, and concludes with a brief description of Ford's failure to remedy any aspect of that hostile environment, despite its receipt of a mounting wave of complaints from Maldonado and from Bennett's five other employee victims.

Maldonado then outlines the publicity surrounding this case—publicity that, as usual, centered on the filing of the case, the impending trial, and other key procedural moments. As will be seen, although the debate over this case was extensive, it did not remotely approach the level of publicity that this and other courts have repeatedly encountered.

Maldonado concludes her statement of facts with a brief summary of the rulings of the circuit court and the Court of Appeals.

A. Ford's failure to take prompt and effective remedial action after Bennett perpetrates severe sexual harassment upon Maldonado.

One evening in January-February 1998, Bennett, a second-line supervisor at the Wixom plant, gave Maldonado, a production worker under his supervision, a routine order to take a production to the repair building, where Bennett would then give her a ride back to the plant in a production vehicle that he was driving. When Maldonado got into Bennett's car for the return trip to the plant, however, he exposed his penis to her, demanded that she "suck it," and attempted to fondle her breasts and crotch. She told him "No" and got out of the car. A few days later, he exposed himself again under similar circumstances, with similar results (R 317, Pl Resp Mot in Limine, at 4-5, citing Dep of Maldonado, 101-110).

In June 1998, after Maldonado had been laid-off and recalled to a different area of the plant, she saw Bennett following her as she exited I-275 on her way home from work. When she pulled into a public parking lot for what she hoped would be safety, Bennett got out of his car, walked up to her car, and reached in to tug at the chest area of her blouse while asking her to have sex with him in some nearby bushes. Maldonado refused and Bennett returned to his car. As Maldonado drove away, she looked back to see Bennett sitting in his car, masturbating (R 317, Pl Resp Mot in Limine, at 4-5, citing Dep of Maldonado, 114-127).

From June 1998 through August 1999, Bennett demeaned, degraded, and frightened Maldonado in the plant by stalking her, approaching her in her work area, grabbing his crotch, making obscene gestures with his tongue, and otherwise sexually harassing her (R 317, Pl Resp Mot in Limine, at 5-6)(R 317, Pl Resp Mot in Limine, at 5-6).

In October 1998, Maldonado told Ford's production manager and an official in labor relations what Bennett had done to her. From then until June 2000, a Supervisor, the Director of Labor Relations, the Personnel Manager, the Salaried Personnel Manager, and the Deputy Plant Manager learned what Maldonado had reported. None did anything even to investigate Maldonado's repeated complaints (R 317, Pl Resp Mot in Limine, 6; R 431, Pl Offer of Proof, paras 32-34, 37, 39).

As she continued to complain, Maldonado learned that Ford knew of and had done nothing about complaints that Bennett had used his job to perpetrate severe sexual harassment upon eight other women. By June 2000, when she filed suit, both she and knew of two other Ford employees and three high-school girls upon whom Bennett had

perpetrated such abuse (Pl. Appendix, Ex , R 431, Pl Offer of Proof, para B1, B2).

After she filed suit—during the period that she worked at Ford and that Ford claimed to investigate her claim—Maldonado and Ford learned of three other women employees at Wixom upon whom Bennett perpetrated severe sexual abuse. Ford did nothing about any of Bennett’s acts of abuse. In February 2003, Maldonado finally left Wixom due to the unremedied acts of sexual harassment.⁴

B. Ford fails to take prompt and effective remedial action to remedy the other aspects of the hostile work environment that Bennett created and that Maldonado was forced to endure.

1. Bennett’s sexual harassment of three high-school girls.

When Maldonado reported to a UAW official in June 1998 that Bennett had exposed himself to her, the UAW official replied that she was not surprised because Bennett had done the same thing to minors. In 2000, while Bennett was still in the plant, Maldonado saw the police reports that detailed what Bennett had done to the minors (R 317, Pl Resp Mot in Limine, at 5-6; R 431, Pl Offer of Proof, paras 27-29, 31).

As set forth in those reports, in August 1995, the Wixom police informed Ford’s top officials that Bennett had used a Ford production vehicle that he was evaluating for the company to follow three high-school girls from Wixom Road onto I-96 and I-275, where he drove next to the girls’ van and rose up from his seat to display his exposed penis (R 101, Pl Maldonado’s Br in Opp Mot in Limine, at Ex 1; R 431, Pl Offer of Proof, paras 5-21).⁵

⁴ Maldonado left work at Wixom five months after the circuit court dismissed her case. She anticipates moving to amend her complaint to add a constructive discharge claim upon the remand of this matter to the circuit court.

⁵ The plaintiff set forth offers of proof on the M-10 events on multiple occasions before the circuit court. For convenience, she has attached the final comprehensive offer of

Bennett was arrested, prosecuted and convicted for this crime—but Ford never disciplined him for it despite the fact that he used a Ford production vehicle entrusted to him for evaluation to stalk and expose himself to the high-school girls (R 101, Pl Maldonado’s Br in Opp Mot in Limine, at 4-5).⁶

2. Bennett exposes himself and otherwise harasses Ford employee Lula Elezovic.

In November 1998, Maldonado found Ford employee Lula Elezovic crying in the Labor Relations office. When she asked what was wrong, she learned that in late summer 1995 Bennett had signaled Elezovic, an hourly employee under his supervision, to come over to a car in which he was sitting in the railyard at the Wixom plant. When she got there, Bennett was masturbating, and he demanded oral sex from Elezovic. She ran from the area. For years thereafter, Bennett made obscene comments to her, grabbed his crotch, made sexual gestures with his tongue, and otherwise harassed Elezovic (R 317, Pl Resp to Mot in Limine, at 7; (R 431, Pl Offer of Proof, paras 22-25, 30-31-33).⁷

proof that she filed in the circuit court. For reasons of space, she has not included the voluminous exhibits attached to that proof (Pl Appendix, Ex 4, R. 431, Pl Offer of Proof). She has also set forth the record cites for the first offer of that proof before Judge MacDonald. The plaintiff offered the same facts before Judge Giovan in her brief in supporting her motion to dissolve Judge MacDonald’s order and in her Offer of Proof (R. 327, Pl Br in Supp of Mot to Dissolve MacDonald Order, at 1-3 and Ex’s 1-3; R. 431, Pl Offer of Proof, paras 1-21, Ex’s 1-10).

⁶ Bennett was convicted of indecent exposure but in November 2001 secured an expungement of the conviction. As set forth in the official transcript of that proceeding on file in the 35th District Court, the expungement was based on his counsel’s representation to the district judge that Bennett was an “exemplary” citizen. His counsel did not tell the judge that Bennett had been accused of sexually abusing seven women since he was convicted (Tr 35th Dist Ct No. 45-SM 0051142).

⁷ The Court of Appeals sustained a decision by the Wayne County Circuit Court dismissing Elezovic’s claim on the basis that she had asked the Ford supervisors whom she told to keep her complaints about Bennett in confidence. Elezovic now has an application for leave to appeal pending in this Court. See *Elezovic v Ford and Bennett*, Sup Ct No 236749. The record in this case differs from the record in *Elezovic* insofar as

Beginning in January 1999, Maldonado complained to numerous Ford officials about what Bennett had done to her and to Elezovic—but Ford never took any remedial action against Bennett for what he did to Elezovic (R 317, Pl Resp Mot in Limine, 6; R 431, Pl Offer of Proof, paras 32).

3. Bennett forcibly kisses Ford employee Shannon Vaubel.

Before she filed suit in June 2000, Maldonado learned that in May 1997, Bennett came up behind his fifth-known victim, Shannon Vaubel, a probationary employee at Ford. After following her to her father's office, Bennett put his arm around Vaubel and twice attempted to kiss her forcibly (R. 317, Pl Resp Mot in Limine, 8; R. 431, Pl Offer of Proof, para 35).

Ford's Production Manager learned in December 1999 what Bennett had done to Vaubel. In December 1999, he asked the Deputy Plant Manager to get Bennett out of the plant because of what he had done to Vaubel, Elezovic, and Maldonado. Ford refused. After the Production Manager received a copy of the police report on Bennett's abuse of the high school girls, he asked the Deputy Plant Manager to transfer Bennett to another plant based on what he had done to the high-school girls and to three Ford employees. Ford's local management again refused even to transfer Bennett (R 431, Pl Offer of Proof, paras 36-37).

there is additional notice here on the crucial issue of notice to Ford of what Bennett had done to Elezovic.

4. Bennett forcibly kisses Milissa McClements on two occasions at the Wixom plant.

In June 2000, when Maldonado announced the filing of this action in the local media, Ford put Bennett on paid leave. The plant manager declared that Ford had not disciplined Bennett but had taken steps to protect him against “more false charges” —that is, charges that the company had decided were false before they were ever filed (R 317, Pl Resp Mot in Limine, at 6).

Richard Gross, Ford’s North American Manager for Equal Employment, took over the investigation of all of the charges against Bennett (R 431, Pl Offer of Proof, paras 48-49). During the course of that investigation, Gross learned that in late fall 1998, Bennett had twice came up behind Milissa McClements (a cashier for the food vendor at the Wixom plant), grabbed her by the shoulders, spun her around, and attempted to kiss her forcibly. As she pushed him away, he asked if there was a place where they could have sex (R 317, Pl Resp Mot in Limine, 7-8; R 431, Pl Offer of Proof, paras 22-25).

As of the trial date in this case, Ford had taken no action against Bennett as a result of the evidence that it received from McClements.⁸

5. Bennett exposes himself to and solicits prostitution from Ford employee Pamela Perez inside the Wixom plant.

During the time that Ford was purportedly investigating Maldonado’s complaints, Gross also learned that in August 1999, Bennett offered money to Wixom hourly employee Pamela Perez to buy lingerie at Victoria’s Secret so that she could “model” it for him after work. In the same month, when Perez’s supervisor directed her to go to Bennett’s office, Bennett put hundreds of dollars on his desk for Perez to get a “hotel

⁸ The Court of Appeals reversed the decision of the Oakland County Circuit Court dismissing McClements’ claim and Ford now has an application for leave to appeal on that case pending in this Court. *McClements v Ford and Bennett*, Sup Ct No. 126276.

room.” When she refused, Bennett had pushed his chair back to show his exposed penis, telling Perez that she could keep all the money if she “took care of him” (Pl 317, Pl Resp Mot in Limine, 9-10, R 431, Pl Offer of Proof, paras 42-43).⁹

As of the trial date, Ford had taken no action on the notice that they had received from Perez.

6. Bennett solicits sex from Ford employee Jennifer Cochran.

Finally, during the investigation of Bennett, Gross also received notice that in October or November 1999, Bennett threw two wadded-up hundred dollar bills at Ford employee Jennifer Cochran, telling her to meet him after work. Cochran told herself that it was a joke—but Gross, who knew of Bennett’s other acts—did nothing about that incident either (R 317, Pl Resp Mot in Limine, 10-11; R 431, Pl Offer of Proof, paras 46-47).

B. The publicity regarding this case.

1. Publicity before May 2002.

On June 30, 2001, the plaintiff announced the filing of her lawsuit at a press conference. In January 2001, the New York Times ran an extended story on sexual harassment at Ford, featuring the situation at Wixom in general and Maldonado’s case in particular (Pl Appendix, Ex 5).

On September 11, 2001, the plaintiff’s counsel issued a press release announcing the filing of two more sexual harassment cases involving Ford Wixom. The press release was issued before it became known what had occurred at the World Trade Center and Pentagon on that day. In light of those events, the press release itself obviously generated

⁹ Perez has appealed the decision of the Wayne County Circuit Court to the Court of Appeals, where it is now pending. *Perez v Ford and Bennett*, Ct App No. 249737.

no publicity at all (Ford Appendix, Ex E). The Detroit Free Press and other local media did, however, cover sexual harassment at Wixom later in the fall.

2. The May 17, 2002 hearing.

On May 17, 2002, after the media arrived to cover the motion hearing in which Ford attempted to exclude the testimony of the other women employees whom Bennett had victimized, Ford and Bennett asked for a meeting in chambers. As no record was kept or requested of that meeting, there is no evidence upon which this Court can evaluate what was said during that conference.

Nevertheless, plaintiff's counsel agrees with Ford counsel's representation that Bennett's attorney informally asked the trial judge to issue an order precluding comment upon Bennett's conviction for exposing himself to the high-school girls under the purported authority of the expungement statute MCL 780.623(5) (Ford App, at 6-7). Plaintiff's counsel, however, does not agree with the rest of Ford's rendition of that conference.

In particular, plaintiff's counsel recalls advising the trial judge that if that statute were construed to prohibit public comment upon the *fact* that Bennett had been convicted, it would be an unconstitutional prior restraint upon speech. As all agree, the circuit court did not decide whether the plaintiff's or the defendant's view of MCL 780.623(5) was correct—nor did the circuit court issue any order or even informal directive as to whether public comment upon that subject was or was not prohibited.

Plaintiff's counsel agrees that the circuit court excluded the cameras from the courtroom. Contrary to Ford's claim (Ford App, at 6), however, the circuit court did not ban the media from the courtroom and several print and television reporters sat through

the proceedings. After the May 17 hearing, counsel for both the plaintiff and for the defendant made comments to the press. Other than the broadcasts themselves and later assertions by Ford or Bennett's attorneys, there is no evidence as to what any counsel said in those comments. Nor is there any evidence that anything reported on that day had not been stated by one or both sides in open court in full view of the media who were present.

3. Publicity from May 17, 2002-June 21, 2002.

On May 28, 2002, and June 1, 2002, the plaintiff and one of her attorneys, Ms. Miranda Massie, discussed sexual harassment at Wixom in, respectively, a public meeting chaired by the Honorable John Conyers in Greater Grace Temple in Detroit, and at a public meeting sponsored by the By Any Means Necessary Coalition in Ann Arbor.¹⁰ Ford has provided no evidence that there was any press coverage of their comments at either event—or as to what plaintiff's counsel or the plaintiff said at those events.

In mid-June, the Detroit weekly, the *Metro Times*, published an extensive story on sexual harassment at Wixom, including but by no means limited to coverage of the Maldonado case. Counsel for the plaintiff and for the defendant Bennett are quoted in that article, but neither counsel made any statements about Bennett's conviction or any similar subject (Ford Appendix, Ex H).

On June 13 and 21, 2002, the circuit court conducted further hearings on the evidence issues—which, again, contrary to Ford's assertions were *not* closed to the media (Ford App, at 8). During the course of those hearings, the circuit court issued the

¹⁰ Ford offers no record support whatsoever for its assertion that all (or any) of plaintiff's attorneys were "BAMN officials at the time" (Ford Br, at 7, n 5). The statement is flatly untrue—and made up by Ford with no evidence whatever cited to support it.

following general admonition to counsel to comply with Rule 3.6:

THE COURT: *I'm not making any decisions about this*, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating *that ethical obligation* and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say on the other side, grant a default judgment. I just want everyone to know that. And then *whatever counsel* is involved can answer to their client.

(Ford Appendix, Ex R, Tr 6/21/2002, at 30)(emphasis added).

In a brief that *never* quotes that admonition, Ford distorts it by claiming that it was directed to the parties as well as counsel and by claiming that the trial court issued a clear directive even to counsel that they could make no statements about any evidence that had been excluded (Ford Br, at 8, claiming to cite Tr 6/21/02, Ford Appendix, Ex R, at 30).

4. Publicity from June 22 through July 8, 2002.

Ford has cited no facts supporting the claim that counsel made any statement to the media about excluded evidence after the trial court's June 21 admonition. Instead, Ford claims that the *plaintiff* made such statements—and attempts by innuendo to make the plaintiff's attorneys responsible for statements by third parties.

Ford first complains that at a deposition on June 24, the *plaintiff* stated that she had told hundreds of people about Bennett's conviction—and that she would post it on the Internet if she knew how. Similarly, Ford complains that the plaintiff participated in a June 26 demonstration in front of Ford's World Headquarters and made generalized public statements on that occasion that Ford did not appreciate (Ford App, at 8-9).

Ford then rightly claims that one of Ms. Maldonado's attorneys—Ms. Jodi Masley—was present at that demonstration. But it offers no evidence that she made any public statements at that demonstration—or indeed that she even identified herself to anyone as an attorney. Nevertheless, in its attempt to find a violation of the June 21

comments, Ford engages in the following distortion of the record:

On June 26, two days [after the deposition] and with the trial less than two weeks away, Plaintiff and her counsel joined forces with BAMN, now called the “Justice for Justine Committee,” to hold a press conference in front of Ford’s World Headquarters in Dearborn. Leaflets detailing the inadmissible evidence, including the expunged conviction, were handed out during the press conference and to passers by....

(Ford App, at 9).

There is *no evidence* that plaintiff’s counsel “joined forces with BAMN” nor with the “Justice for Justine Committee.” Nor is there *any evidence* that plaintiff’s counsel spoke at or had anything to do with a press conference in front of Ford’s World Headquarters. Nor, finally, is there any evidence that plaintiff’s counsel had anything to do with the writing, publication or distribution of the leaflet that was distributed at that location (Ford Appendix, Ex M, Tr 7/8/02, at 114-115).

Ford’s sole claim is guilt by association. An attorney was present when others exercised their First Amendment rights and so she must, somehow, be held responsible for what the other persons said.

C. The proceedings in the circuit court and in the Court of Appeals.

Maldonado filed suit in Wayne County Circuit Court in June 2000. There are three orders that are of particular relevance here.

First, on February 16, 2001, the Honorable Kathleen MacDonald granted Ford’s motion to exclude all reference to Ford’s failure to do anything about Bennett’s harassment of the high school girls on the grounds that it was purportedly more

prejudicial than probative (Ford Appendix, Ex D).¹¹ At no point did Ford ask or Judge MacDonald rule that this evidentiary ruling precluded public comment upon Bennett's harassment of the high-school girls.

Second, after the case was reassigned to the Honorable William J. Giovan, he declined to dissolve Judge MacDonald's earlier in limine ruling (Ford Appendix, Ex D). Moreover, in the middle of an argument on the admissibility of Ford's inaction in the face of Bennett's harassment of the high-school girls, Judge Giovan ruled that he would also exclude the testimony of all of Bennett's other victims when offered for any of the multiple purposes that counsel had identified (Ford Appendix, Ex R, Tr 6/21/2002, at 21-27, 38-47).

Third, after the circuit court issued its general admonition to counsel on June 21, 2002, defense counsel took his remarks as an invitation to file a motion to dismiss the complaint (R. 371). Despite the fact that Ford had never requested a gag order or any other step to cure the alleged prejudice, the circuit court postponed the trial issued an Opinion and Order granting the defendants' motion and dismissing the case with prejudice (Ford Appendix, Ex B).

Maldonado filed a timely appeal of right from the decisions of the circuit court. In an unpublished Opinion issued on April 22, 2004, the Court of Appeals reversed the decision dismissing the case and remanded the matter for a hearing on whether Ford's right to a fair trial had been prejudiced in any way. Judge White concurred in the reversal

¹¹ Maldonado filed an application for leave to appeal on that issue, which was denied by this Court, with Judge Hood dissenting, and by the Supreme Court, with Justice Kelly dissenting. *Maldonado v Ford and Bennett*, Ct App No. 233449; Sup Ct No. 119753.

but declared that the hearing was unnecessary in view of the passage of two years since the publicity at issue (Ford Appendix, Ex A).

The Court of Appeals also ruled that the circuit court had erred in excluding the evidence of Ford's and Maldonado's knowledge of the other employees who had been victimized by Bennett because it was admissible to prove both the hostility of the environment in which Maldonado worked and Ford's respondeat superior liability for that environment. The Court of Appeals did not rule on the other reasons that the plaintiff had offered for admitting the evidence. Two judges of the Court sustained the circuit court's order excluding evidence that Bennett had used the car he was driving for Ford to harass the three high-school girls on I-275, while Judge White declared that the issue should be remanded to the circuit court for decision in light of the other evidentiary rulings that the Court of Appeals had reversed (Ford Appendix, Ex A).

ARGUMENT

I

THIS COURT SHOULD DENY FORD'S APPLICATION FOR LEAVE TO APPEAL BECAUSE THERE IS NO EVIDENCE THAT THE PLAINTIFF OR HER COUNSEL VIOLATED ANY APPLICABLE STANDARD OF CONDUCT.

A. Maldonado violated no applicable standard of conduct.

At various points in its Application, Ford complains that Maldonado engaged in "flagrant misconduct" when she (1) spoke about her case (and Bennett's conviction) at forums in Detroit and Ann Arbor in June 2002, (2) testified in a deposition that she had told a hundred persons about Bennett's conviction and would post it on the Internet if she knew how, (3) held a press conference at Ford's World Headquarters at which she vowed that she was not going to "quit fighting sexual harassment" even if the circuit court did

not approve of what she was doing, and (4) was present when persons distributed leaflets that contained references to Bennett's conviction (Ford App, at 7-8).

But there is a fundamental flaw in the *premise* of Ford's argument. In the absence of any valid order restricting the her right to speak out about the facts of her case, Maldonado had a First Amendment right to speak publicly about the facts of her case including by criticizing the rulings of the trial judge:

It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the [contempt] judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion [since] ...the more acute ... controversies are, the more likely it is that in some aspect they will get into court.

Bridges v State of California, 314 US 252, 260 (1941).

That right is, of course, not absolute. Upon Ford's request and after an appropriate hearing, the trial court could have issued a narrowly-tailored order prohibiting statements by the plaintiff at certain times on certain clearly-defined subjects. *United States v Ford*, 830 F 2d 596 (CA 6 1987).¹² But neither Ford nor Bennett ever filed a motion requesting such an order.

In the absence of any such order, Ford *labels* Maldonado's statements "flagrant misconduct"—but it never identifies any standard of conduct that she supposedly violated.

¹² See Erwin Chemerinsky, "Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment," 47 *Emory L J* 859 (Summer 1998); W. Bradley Wendel, Free Speech for Lawyers, 28 *Hastings Const L. Q* 305 (Winter 2001) for a summary of the law regarding such gag orders.

The circuit court claimed that she violated Rule 3.6 of the Michigan Rules of *Professional Conduct* (Ex 2, Cir Ct Op, at 6-7). But the Court of Appeals rightly reversed the circuit court on that claim—and Ford does not here even attempt to defend that aspect of the circuit court’s Opinion.

Ford suggests that Maldonado violated the circuit’s June 21 admonition. But it never quotes that admonition because it was directed *solely* to counsel and incorporated only Rule 3.6, which applies only to counsel (see quotation *supra*, at 15).

Ford also briefly suggests that Maldonado had engaged in “criminal” conduct because her mention of Bennett’s conviction purportedly violated MCL 780.623(5). But Ford has long since abandoned that claim because it knows that the United States Supreme Court has held that the state may not punish persons for public statements about judicial proceedings—even if those proceedings were confidential which was clearly not the case for Bennett’s conviction or expungement. *Landmark Communications v Virginia*, 435 US 829 (1978).

Finally, in addition to failing to demonstrate that Maldonado engaged in any conduct that violated any applicable standard, Ford asks this Court to take a dangerous step by inferring that the plaintiff intended to prejudice the jury based solely upon the fact that she spoke out about the facts of sexual harassment at Wixom. From the beginning, Maldonado (and her attorneys) have insisted on their *right* to speak out publicly about those facts, including Bennett’s stalking of the high-school girls, because those facts demonstrate the depth of sexual harassment at Wixom and because speaking out about them is a way to end that harassment. But to infer an unlawful intent from the exercise of a right under the First Amendment is indeed a dangerous and unprecedented path.

If Ford believed that Maldonado's comments were intended to or had the effect of prejudicing the jury, it could have asked for an order restraining Maldonado from speaking in certain ways on certain subjects. Having failed to do, Ford cannot specify *any* standard of conduct that Maldonado supposedly violated. Its extended rendition of her purported statements is thus irrelevant—and its request that this Court grant leave based on those statements is not only insubstantial but is in fact patently frivolous.

B. Maldonado's attorneys violated no applicable standard of conduct.

Ford claims that Maldonado's attorneys violated Rule 3.6 and the circuit court's incorporation of that Rule in its June 21 comments. But Ford fails even to quote that Rule. It provides as follows:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The very words of Rule 3.6 make clear that most of Ford's claims against Maldonado's attorneys are not even covered by Rule 3.6 or by the circuit court's admonition. Insofar as Ford complains about statements to the press and in leaflets at the demonstration outside Ford World Headquarters, there is no evidence that Maldonado's attorneys made *any public statement* at that protest. Insofar as Ford claims that Maldonado's attorneys assisted others in making those statements, Rule 3.6 does not prohibit that and, even if it did, there is no evidence that Maldonado's attorneys provided any assistance to any person on their press statements or leaflets.¹³

¹³ As is clearly established, the circuit court had no authority to prohibit the Justice for Justine Committee or anyone else from publishing what they wanted, including references to the excluded evidence. *Nebraska Press Association v Stuart*, 427 US 539 (1976). Indeed, while Ford complains about the leaflets at its headquarters, in most high-

Similarly, insofar as Ford complains that counsel made statements at public forums on May 28 or June 1, there is no evidence that Rule 3.6 even applies to those statements since (1) there is no evidence as to what those statements were nor (2) any evidence that the statements were or had *any* likelihood of being disseminated by any “means of public communication.”

Finally, insofar as Ford complains about the *Metro Times* article in mid-June 2002, there is no claim that any attorney for the plaintiff made a *statement* in that article that violated Rule 3.6.

Of the Ford’s claims that counsel violated Rule 3.6, only two are even covered by that Rule: (1) the September 11 press release and (2) the statements that counsel made to the media outside the courtroom on May 17, 2002. However, the fact that counsel issued a press release or made statements to the media is not in itself a violation of Rule 3.6.¹⁴

As to the May 17 comments, Ford has provided no competent evidence as to what counsel actually said on May 17.¹⁵ As to both statements, the Comments to Rule 3.6 provide for safe harbors allowing counsel to comment upon matters of public record or

visibility cases, the press publishes far more prejudicial information to a much wider audience.

¹⁴ As the nation’s foremost expert on legal ethics has stated, press releases are now part of the standard duties of attorneys:

The new reality is no doubt troubling to the many lawyers who consider themselves “traditionalists.” Just as they have been grudgingly coming to terms with the fact that successful law practice today often must include advertising campaigns and public relations presentations, they must now adjust to the idea that media specialists and press conferences are also fast becoming essential elements or the modern lawyer’s arsenal, at least in high profile cases.

Geoffrey Hazard, *The Law of Lawyering*, at 32-9.

¹⁵ Ford’s Application rests solely upon unsworn and very general allegations by opposing counsel as to what plaintiff’s counsel supposedly said on May 17 (Ford App, at 7).

upon the general nature of their claim or defense.¹⁶ Since the fact that Bennett was convicted and the fact that he had committed the acts attributed to him were part of the public record of this and numerous other courts throughout the state, it is self-evident that counsel's reference to those facts falls squarely in the middle of both of those safe harbors.¹⁷

In practice, Ford demonstrated that it knew that counsel's statements on September 11 and May 17 did not violate Rule 3.6. From September 11, 2001, until June 28, 2002, Ford filed no complaint with the Court or with the AGC over the September 11 press release or over any comment that counsel made to any media representative.

Only after the circuit court after the circuit court's June 21 comments, did Ford dredge up the September 11 and May 17 statements to use as the basis for a claimed violation of that Rule. These very belated claims cannot withstand *any* scrutiny—much less the exacting scrutiny required under the First Amendment. But even if they could, an academic discussion as to whether a barely-noticed press release and unspecified but surely long-forgotten comments violated Rule 3.6 is not, under any circumstances, a substantial and controlling question of law that this Court needs to review.

¹⁶ The Comment provides a safe harbor for such statements with the following language: “Notwithstanding Rule 3.6 and paragraphs (a)(1-5) [of the Comment],” a “lawyer involved in the litigation of the matter may state without elaboration” ... (1) the general nature of the claim or defense [and] (2) the information contained in a public record...” Comment, Rule 3.6, Mich Rules of Prof Conduct, quoting ABA Model Code, Rule 3.6, secs (b)(1) and (2). See *Attorney Grievance Commission of Maryland v Gansler*, 377 Md 656 (2003) for a discussion of these safe harbors.

¹⁷ Ford's sole claim on this point is that Bennett's conviction was not a public record for purpose of Rule 3.6 because it was not a public record *for purposes of the Freedom of Information Act* (Ford App, at 32 n 15). Beyond that, Ford does not even attempt to demonstrate that anything counsel said on September 11 or May 17 fell outside of the boundaries of those safe harbors.

II

THIS COURT SHOULD DENY FORD'S APPLICATION FOR LEAVE TO APPEAL BECAUSE THE COURT OF APPEALS CORRECTLY FOUND THAT THE CIRCUIT COURT HAD DISMISSED THIS CASE BASED UPON A STANDARD THAT WAS VOID FOR VAGUENESS.

In support of its claim that the trial court had the “inherent authority” to dismiss this case, Ford cites a litany of cases in which the appellate courts have approved the dismissal of cases or other sanctions imposed upon litigants who threatened to murder opposing witnesses, attorneys who repeatedly defied a judge's evidence rulings, and attorneys and clients who fraudulently invoked the court's jurisdiction. See Ford App, at 22-26, citing respectively, *Cummings v Wayne County*, 210 Mich App 249 (1995); *Perisichini v Beaumont Hospital*, 238 Mich App 626 (1999); and *Chambers v NASCO, Inc.*, 501 US 32 (1991).

But Ford fails even to address the question of the procedures that must be followed when a trial court wants to restrain or sanction conduct that consists of public statements that are normally protected by the First Amendment. Ford not only fails to address that question—it fails to do more than barely acknowledge that the Court of Appeals directly held in this case that the circuit court had followed a procedure in this case that was unconstitutionally void for vagueness (Ford Appendix, Ex B, Ct App Op, at 6-7, n 3).

Even a brief review of the applicable case law demonstrates that the Court of Appeals' holding is obviously correct. As the Supreme Court has repeatedly held, government regulation of out-of-court speech by attorneys or litigants must be narrow and precise in order to avoid the dangers of discriminatory enforcement and the chilling of protected speech because it is not clear what speech is actually prohibited by the

regulation in question. See *Button, supra* (no-solicitation rule); *Gentile, supra* (Rule 3.6); *Bridges, supra* (contempt citations). In fact, the Supreme Court has specifically struck down the imposition of sanctions based on an after-the-fact determination by a trial judge that certain statements purportedly violated general standards preventing speech that “interfered with the administration of justice;”

No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case.

Bridges, supra, 314 US at 269.

Following those precedents, the Sixth Circuit and numerous other courts have held that a trial court may *only* limit the right of parties or their attorneys to speak out about a pending case if the proponent of the order demonstrates at a hearing that the speech poses a clear and present danger to its right to a fair trial and only if the court issues an order “couched in the narrowest possible terms that will accomplish the pinpointed objective permitted by constitutional mandate.” See *United States v Ford, supra*, 830 F 2d at 600 and other authorities cited *supra* in Note 11. Ford does not discuss any of these precedents because it could find no precedent to dispute the Court of Appeals ruling that the circuit court had dismissed this case “under an unconstitutionally vague standard” (Ct App Op, at 6-7 n 3).

By their very nature, the circuit court's informal, in-chambers remarks on May 17 could not take the place of a precisely drafted order couched in the narrowest possible terms. In fact, there is no record of what the court said—and whatever was said neither Maldonado nor anyone save counsel even heard it. But even as to counsel, all agree that in the face of plaintiff's counsel's specific assertion of a right to speak about Bennett's conviction, the circuit court did not issue a formal or even informal gag order prohibiting comment on that or other subjects.

Similarly, the circuit court's general invocation of Rule 3.6 on June 21 cannot take the place of such an order. Apart from the fact that the June 21 comments clearly cannot be a retroactive warning as to public statements made on May 17 or September 11 of the preceding year, the June 21 comments themselves are undeniably vague. Nor does the invocation of Rule 3.6 cure this defect because the United States Supreme Court *directly held* that the Nevada equivalent of Rule 3.6 was itself void for vagueness *on the very question at issue here*. *Id.*, 501 US at 1048-1051 (Kennedy, J), and 1082 (O'Connor, J).¹⁸ As the Michigan Rule provides no guidance in its text—and as the Comment incorporates the *same* contradictory provisions found vague in *Gentile*—the circuit court's June 21 reference to Rule 3.6 cannot substitute for an order “couched in the narrowest possible terms” to accomplish the “pin-pointed objective” permitted by the Constitution. *US v Ford*, *supra* 830 F 2d at 600.

¹⁸ The Court held the Nevada Rule vague because it declared that comments upon certain subjects (including inadmissible evidence and prior convictions) was ordinarily prohibited—but then declared that notwithstanding that prohibition counsel could comment publicly upon matters of public record or upon the general nature of an asserted claim or defense. *Gentile*, *supra* 501 US at 1048-1051, 1082.

If the Court wanted to restrain specific speech, it had an obligation to spell out what was and was not being restrained. *Id.* In the absence of such a specification, the Court of Appeals rightly determined that the procedure employed here regulated speech by a standard that was unconstitutionally vague.

The circuit court's order in this case dramatically illustrates the danger of vague regulations in the area of the First Amendment. Not only did the circuit court dismiss an action based on a standard that was at the very least unclear as to whom it applied to and what it covered, the very vagueness of the standard also opened the door to discriminatory enforcement. The circuit court dismissed this action in part because of information that the plaintiff's attorneys supposedly provided to the Metro Times—but it completely ignored comments by counsel for Bennett in the same article, declaring that all of Bennett's victims were liars—even though remarks about the credibility of witnesses are directly and specifically prohibited by the Comment to Rule 3.6.¹⁹

Instead of asking this Court to attempting to salvage a procedure that is fundamentally flawed and that has *never* been approved by a *single* case from *any* jurisdiction, Ford should simply move on remand for a clear and narrow order prohibiting the comments that it believes may lawfully be proscribed. There is no need for this Court to review this case at this time.

¹⁹ See, e.g., Ford Appendix, Ex H, Ann Mullen, Shut Up: Ford would rather not hear about sexual harassment claims, *Metro Times*, June 12-18, 2002, at 13.

III

THIS COURT SHOULD NOT REVIEW THIS MATTER WITHOUT BENEFIT OF THE REMAND HEARING BEFORE THE CIRCUIT COURT.

- A. The Court should not review this matter in the absence of any showing that Ford's right to a fair trial cannot be preserved by the circuit court.

As Ford explicitly recognizes, this Court has repeatedly held that the trial court should not even grant a *change of venue* without attempting to determine through voir dire whether it is possible to select a fair jury. See, e.g., *People v Jendrzejewski*, 455 Mich. 495, 517 (1997). As Ford's brief concedes, it would be "virtually impossible" for it to make such a showing here (Ford App, at 34).

According to Ford, however, it should not be required to show such a taint because summary dismissal is the only sanction that could possibly deter the supposedly premeditated misconduct that occurred here (Ford App, at 26-27). As set forth above, however, there has been no showing of any misconduct by plaintiff or her counsel in this case—much less a showing of "intentional," "intransigent," and premeditated" misconduct.

If, however, the circuit court believed that there was misconduct—or even prejudice absent any misconduct—it has a ready remedy to cure that prejudice. It could, as the Court of Appeals recommended that it do, issue on remand an order that clearly specified that the plaintiff and her counsel were not to make statements on specified subjects. There is no evidence in this or any other record that the plaintiff or counsel have *ever* failed to comply with an order of the court—and there is thus no showing that the only way to deter the asserted "misconduct" is to dismiss Ms. Maldonado's case.

As the *Bridges* Court held, applying draconian sanctions to punish arguable violations of vague standards chills speech on issues of vital public concern. Ford's claim that speech that it *claims* to be unprotected must be summarily and retroactively punished by the most draconian sanction available should be rejected by this Court because it poses a danger to every litigant and attorney who wants to comment upon affairs of great importance to the State and its citizens.

- B. The Court should deny the application because there are numerous constitutional challenges that have not and need not be considered in the absence of any showing of prejudice.

As the Court of Appeals declared, there are numerous Constitutional issues that it did not even consider.

Among the issues that the Court of Appeals did not find it necessary to address were the plaintiff's and the ACLU's claims that the circuit court violated the First Amendment by basing its dismissal on findings that (1) Maldonado was present at Ford World Headquarters when others distributed leaflets that referred to Bennett's conviction; (2) Maldonado vowed on television that she would keep fighting sexual harassment whatever the judge did; (3) Maldonado declared that she must have told 100 people about Bennett's conviction; (4) Maldonado spoke about the conviction at a meeting in a church presided over by the Honorable John Conyers; (5) attorney Masley failed to dissuade others from passing out leaflets at the demonstration at Ford World Headquarters; (5) attorneys Washington and Massie appeared in news broadcasts where others referred to the conviction; and (6) the same attorneys also appeared in a Metro Times article in which the conviction was discussed (Ford Appendix, Cir Ct Op, at 5-10). Ford has added

to the list of undecided issues by claiming, inter alia, that attorneys Washington and Massie violated Rule 3.6 by providing public documents to a reporter (Ford Appl, at 7).

As the ACLU and the plaintiff argued below, each of these findings violates the First Amendment rights of free speech and free association. But the Court of Appeals found it unnecessary to rule on any of these issues because it reversed the circuit court on other grounds. As the Court of Appeals has not—and may never have to—rule on any of these Constitutional challenges, there is no reason for this Court to grant review now.

IV

THE COURT SHOULD NOT REVIEW THE EVIDENTIARY ISSUES BECAUSE THE COURT OF APPEALS PROPERLY FOUND THAT THE CIRCUIT COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE THAT FORD KNEW OF AND DID NOTHING ABOUT BENNETT’S SERIOUS, WORK-RELATED SEXUAL HARASSMENT OF FIVE OTHER WOMEN.

- A. The Court of Appeals properly reversed the circuit court’s in limine order excluding evidence demonstrating the hostile environment that Maldonado was forced to endure.

This Court has held that “The essence of a hostile work *environment* action is that one or more supervisors or co-workers create an *atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them.*” *Radtke v Everett*, 442 Mich 368, 385 (1993)(emphasis added).

As the emphasized words make clear, the hostility of the “environment”—of the “atmosphere”—towards “members of one sex” is what the plaintiff must prove. That environment or atmosphere includes what Bennett did to Maldonado herself—but it is not limited to that. She is clearly not the only member of her sex in the plant.

If a woman employee knows, as Maldonado did, that Bennett is exposing himself to, stalking and assaulting other women during the course of his employment, that

woman would feel, as Maldonado did, that her working environment is hostile, even if she herself had never been harassed. If, as here, she was being harassed herself, what she knew was happening to other women would compound her sense of anger, fear, and disgust at the environment in which she continued to work.

In excluding this evidence, the circuit court declared that there were “no cases” that held that Bennett’s other acts should be admitted to establish the hostility of the environment that the plaintiff had endured (Ford Appendix, Ex R, Tr 6/21, at 46-47). In seeking leave to appeal, Ford concedes that there is one case so holding—but asserts that it has “...not been followed by any other jurisdiction, at least until the Court of Appeals opinion here” (Ford App, at 41-42, citing *Jackson v Quanex*, 191 F.3d 647 (CA 6 1999)).²⁰

Both claims are dead wrong. The federal circuits have *unanimously* held that the trial courts should admit other acts of sexual (or racial) harassment that the plaintiff was aware of during the time that she worked for the company because those acts are part of the hostile work environment that she faced. See, e.g., *Hicks v Gates Rubber Co*, 833 F 2d 1406, 1416 (CA 10 1987); *Hall v Gus Const Co, Inc*, 842 F 2d 1010, 1015 (CA 8 1988); *Hurley v Atlantic City Police Department*, 174 F 3d 95, 110-111 (CA 3 1999), *cert den* 528 US 1074 (2000). As far as plaintiff is aware, there is no case—and none has been cited by Ford—that has excluded proof of other acts of sexual or racial abuse from

²⁰ Ford also attempts to distinguish *Jackson* by claiming that it was a “...notoriously racially hostile work environment in a relatively small workplace...purportedly generated by...organized groups of dangerous rednecks...” (Ford App, at 42). But it is unclear where the distinction lies: Wixom had a notorious sexually hostile work environment perpetrated by a high manager on those women whom he came into contact with during the alleged performance of his duties.

evidence where the plaintiff knew of those events during the time that she worked at the company.²¹

In this case, there is no question that the sexual harassment that Bennett perpetrated upon others polluted the environment in which Maldonado worked. With the exception of Cochran, who had moved out of state by the time Maldonado learned what Bennett had done to her, Maldonado learned of what Bennett had done to the other women from repeated direct conversations with those women during the time that she worked for Ford.

At a time that Maldonado was being abused, she talked repeatedly with Elezovic about the fact that Bennett had exposed himself to, stalked and otherwise abused Elezovic. She even complained to Ford about the abuse of Elezovic, and, on one occasion, Maldonado and Elezovic jointly complained to the company that Bennett was still harassing both employees. Maldonado also learned of what Bennett had done to Vaubel while Bennett was still in the plant (R 317, Pl Resp Mot in Limine, 6, 8; R 431, Pl Offer of Proof, paras 32, 35).

Maldonado learned of the harassment that Bennett had perpetrated upon Perez, McClements and Cochran while she continued to work at Wixom and at a time when Ford had still taken no remedial action whatever against Bennett. The fact that Bennett was on administrative leave for an unspecified period did not eliminate the effect that this knowledge had on Maldonado. She knew that Bennett could return at any moment to the

²¹ In asking this Court to review the decision of the Court of Appeals, Ford cites irrelevant cases in which the court found that there was no evidence that the plaintiff knew of the other acts of harassment during the period that she claimed that she suffered from a hostile environment at the company. See *Beyda v City of Los Angeles*, 65 Cal App 4th 511 (1998); *Abeita v Transamerica Mailings, Inc*, 159 F 3d 246, 249 n 4 (CA 6 1998); *Burnett v Tyco*, 203 F 3d 980, 981 (CA 6 2000).

place where she worked—and she knew that her employer had failed to take any action against a man who had harassed six women inside the Wixom plant (R 317, Pl Resp Mot in Limine, 6, 8; R 431, Pl Offer of Proof, para B 2).

As Maldonado, her family, her ministers and doctors, and common sense would testify, her knowledge that Ford had done nothing to remedy of these acts of abuse deepened her sense of the hostility of the environment in which she worked—ultimately leading her to leave Ford in February 2003.

In excluding the other acts evidence, the circuit court wrongly—and with no legal support whatever—deprived Maldonado of the opportunity to prove the hostility of the *environment* that she faced during the course of her employment at the Wixom plant.²² As the Court of Appeals Opinion on this point was solidly grounded in the *Radtke*, *Chambers* and the unanimous precedents of the federal courts, there is no reason for this Court to review that ruling.

B. The Court of Appeals properly reversed the circuit court’s order excluding evidence relevant to establishing Ford’s respondeat superior liability.

As this Court has held, Ford can be held responsible for Bennett’s sexual harassment “...if [it] failed to take prompt and adequate remedial action after having been put on notice of the harassment.” *Chambers v Trettco*, 463 Mich 297, 313 (2000). The Court declared that the “...notice of sexual harassment is adequate if, by an objective standard, the *totality of the circumstances* were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.” *Id*,

²² Ford suggests that because the Wixom plant is large, the other acts by Bennett of which Maldonado was aware were not part of her work environment (Ford Appl, at 42). But there is no “large plant exception” and other acts of which the plaintiff was aware are, by definition, part of her work environment.

463 Mich at 319 (emphasis added). As this Court held, the adequacy of Ford's investigation and remedial action must also be judged in light of the "totality of the circumstances" known to the company. *Id.*

By definition, "the totality of the circumstances" includes the notice that Ford had as to what Bennett had done to Maldonado *and* what he had done to the other five women listed above. Ford has a duty to correct the hostile environment—not simply individual manifestations of that environment.

In assessing the investigation that Ford undertook, the jury was entitled to consider the "totality of the circumstances" known to Ford. Just as a police department rightly gives priority to reports of an apparent serial criminal, the jury needed to know that Ford had information that Bennett was a serial harasser in order for it to judge whether the investigation that Ford undertook was prompt or adequate in light of the totality of the circumstances known to the company.

Similarly, the jury needs to know the results of the investigation that Ford conducted in order to assess the decisions that Ford made as a result of that investigation. While investigating Maldonado's complaint, Ford undeniably received evidence that Bennett had sexually harassed five other women inside the Wixom plant. In deciding whether Ford reasonably decided to do nothing on Maldonado's complaint, the jury was entitled to know the evidence that Ford uncovered during the course of its own investigation. Otherwise, Ford could say, as it has, that it turned up no information to show that Bennett had created a hostile environment—when the excluded evidence showed that claim was demonstrably untrue.

As is obvious, Ford's personnel department was not *bound* by the requirements of MRE or FRE 404 in determining what action to take against Bennett. *Waters v Churchill*, 511 US 661, 675-676 (1994). Just as obviously in assessing the decisions that Ford's personnel department made, the jury was entitled to know the information that Ford considered when it did nothing on any complaint that Bennett had created a hostile work environment at Wixom. *Chambers, supra*.

Indeed, the circuit court's order would have prevented the jury from assessing the actual process by which Ford's managers made decisions on what to do about Bennett. In December 1999, the Wixom Production manager asked the deputy plant manager to transfer Bennett to another plant because of what he had done to Elezovic, Maldonado *and* Vaubel. In May 2000, he repeated that request, now based upon what Bennett had done to those three employees *and* what he had done to the high school girls. On both occasions, the Wixom plant management refused to do anything. (R 431, P1 Offer of Proof, paras 36-37). Under the circuit court's order, however, the participants in these conversations would not be able to tell the jury what was said during the course of meetings whose sole purpose was to determine what to do with Bennett as a result of the complaints filed by Maldonado and by others.

After June 2000, Ford's central managers—including its EEO manager Richard Gross—refused to discipline Bennett in any way even though these managers learned during the course of their investigation that Elezovic, Vaubel, Maldonado, Perez, McClements and Cochran had all reported that Bennett had perpetrated serious acts of sexual abuse upon each of them. If the trial court order excluding this evidence had been sustained, the jury could not have assessed the reasonableness of Ford's actions in light

of the “totality of the circumstances” known to that management because the circuit court’s order would have prevented the jury from knowing the totality of the circumstances known to Ford.

The federal circuits have unanimously held that if the company knows of other acts of the sexual harassment by the same perpetrator that evidence is admissible to establish the knowledge that the company had when it did not investigate or remedy the abuse perpetrated upon the plaintiff. *Hirase-Doi v U.S. West Communications, Inc.*, 61 F 3d 777, 783-784 (CA 10 1995). *See also Hurley v Atlantic City Police Department*, 174 F 3d 95, 110-111 (CA 3 1999), *cert den* 528 US 1074 (2000); *Paroline v Unisys Corp.*, 879 F 2d 100, 107 (CA 4 1989), *rev’d on other grounds* 900 F 2d 27 (CA 4 1990); *Dees v Johnson Controls World Services, Inc.*, 168 F 3d 417, 423 (CA 11 1999); *Bandera v City of Quincy*, 344 F 3d 47, 53 (CA 1 2003); *Munn v Mayor*, 906 F Supp 1577, 1584 (SD Ga 1995); *Parker v Olympus Health Care*, 264 F Supp 2d 998, 1002-1003 (D Utah 2003).²³ In fact, Ford has yet to cite a *single* case from *any* jurisdiction that has excluded evidence that the company had knowledge that the same man had harassed other women in the same plant.

Without precedent in support of its position, Ford’s application misstates the Court of Appeals’ ruling—and then urges this Court to reverse its misstatement.

²³ As can be seen from a detailed review of these cases, almost all of these federal courts so ruled applying a standard for respondeat superior liability announced by this Court in *Chambers*. Because of the dates of the decisions or the fact that the harassers were not supervisors, none of these cases applied the federal standard that this Court specifically disavowed in *Chambers*. *See Chambers*, 463 Mich at 313-316, declining to adopt *Farragher v Boca Raton*, 524 US 775 (1998) and *Ellerth v Burlington Industries*, 524 US 742 (1998).

Ford claims that the Court of Appeals eviscerated the state's fault standard by allowing the plaintiff to avoid her burden of proving that Ford was "at fault" for allowing Bennett to harass her (Ford App, at 36-37). But Maldonado asked the circuit court and the Court of Appeals to let the jury hear the totality of the circumstances known to Ford so that it could properly determine whether Ford was at fault for taking no action to remedy the hostile environment that Bennett had created.

Similarly, Ford asserts that the Court of Appeals ordered the evidence admitted in order to show Ford's constructive knowledge of the sexually hostile work environment (Ford App, at 37-39). But it is obvious that the Court of Appeals ordered the evidence admitted because the reports by the other women gave Ford *actual* notice of the hostile work environment that Bennett was creating (Ct App Op, at 9).

Ford asserts that the notice was equivocal because there were no other witnesses to the other acts of sexual harassment (Ford App, at 39). But in cases charging serious crimes, the courts routinely instruct juries that they may find that a defendant has been proved guilty beyond a reasonable on the basis of testimony that is not corroborated by any other witness. CJI 2d 20.25. It is absurd to say that evidence sufficient to prove someone guilty beyond a reasonable doubt is insufficient to provide notice to Ford that Bennett may have created a hostile work environment at its plant.

Finally, Ford complains that even if it had known of and done something about Bennett's abuse of the other women, it would not have mattered to the plaintiff since Bennett had finished abusing Maldonado before Ford learned of his abuse of the other women (Ford App, at 40). As to Elezovic and the high-school girls, that is factually untrue.

As to the other complaints, it is irrelevant. *Chambers* and *Radtke* normally impose a duty upon the employer to remedy the abuse *after* the employer has notice of abuse that has *already* occurred. The fact that Ford also learned of Bennett's abuse of the other women after he had already harassed Maldonado is irrelevant. If the company had taken remedial action upon any complaint filed against Bennett, Maldonado would have faced a significantly less hostile work environment. The fact that it did not said to her—and to the other women—that Ford would do nothing on any complaint of sexual harassment against Bennett or any other supervisor.

Ford wants to convert its responsibility to remedy a sexually hostile *environment* into a responsibility to remedy a series of supposedly discrete acts of abuse. As this Court held in *Chambers*, however, the jury is entitled to assess whether the company's actions *to abate a hostile environment were reasonable in light of the totality of the circumstances that the company knew about that environment*. As the Court of Appeals properly followed this Court's decisions in *Radtke* and *Chambers* and the unanimous decisions of the federal courts, there is no reason whatever for this Court to review that ruling.

C. The Court of Appeals properly held that the circuit court abused its discretion by excluding the evidence under MRE 403.

Ford finally argues that the trial court could have excluded the evidence under MRE 403 because of the supposed danger of confusion and prejudice (Ford App, at 43-45). Under that rule, the circuit court may exclude evidence "...if its probative value is *substantially outweighed* by the danger of unfair prejudice..." (emphasis added). As this Court has held, "[e]vidence is unfairly prejudicial when there exists a danger that

marginally probative evidence will be given undue or preemptive weight by the jury.”

People v Crawford, 458 Mich 376, 398 (1998)(emphasis added).

By any standard, the evidence as to what Bennett did to Elezovic, Vaubel, McClements, Perez and Cochran is not “marginally probative.” For the reasons set forth above, it highly probative on the two key *elements* of the hostile environment claim itself—the hostility of the environment that Maldonado faced and Ford’s respondeat liability for that environment. In each of the federal cases cited above (*supra*, at 35), the Court specifically rejected the claim, as the Court of Appeals did here, that such centrally probative evidence should be excluded because there was a chance that it could also be used in an improper way under MRE 404. Similarly, in *Crawford*, *Starr*, *Sabin* and the other decisions by this Court interpreting MRE 403 and 404, this Court has never rejected testimony as unfairly prejudicial where that evidence established key elements of the crime or of the cause of action itself.

V

IF THIS COURT SHOULD GRANT LEAVE TO APPEAL THE COURT OF APPEALS’ DECISION INsofar AS IT EXCLUDED EVIDENCE THAT FORD KNEW OF AND DID NOTHING ABOUT BENNETT’S ABUSE OF FIVE OTHER WOMEN EMPLOYEES, THE COURT SHOULD ALSO GRANT LEAVE TO CROSS APPEAL ON THE QUESTION OF WHETHER THAT SAME EVIDENCE IS ALSO ADMISSIBLE FOR OTHER PURPOSES.

In reversing the circuit court, the Court of Appeals did not reach the plaintiff’s offer of the evidence as to what Ford allowed Bennett to do to the other five women for purposes other than establishing the hostility of the environment that Maldonado faced and Ford’s respondeat superior liability for that environment. In the event, however, that this Court should grant review on the admissibility of this evidence, the Court should consider the other purposes for which it was offered both because it is necessary in order

to avoid needless remands and appeals—and because it is impossible to assess the MRE 403 balance without weighing the total probative force of the evidence against the asserted unfair prejudice.

A. The evidence is admissible to establish Ford's intent

The plaintiff contends that Ford took no action to remedy Bennett's creation of a sexually hostile work environment because the relevant officials were extremely hostile to women. Ford, on the other hand, claims that its officials made an unbiased determination that the evidence did not support any action against Bennett.

As one of the most eminent conservative judges has held, evidence of the company's action on similar cases is almost always *essential* in proving whether the company acted based upon a discriminatory intent:

Proof of such discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. ... A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

Riordan v Kempiners, 831 F.2d 690, 698-699 (CA 7 1987)(Posner, J). *Accord.* *Brown v Trustees of Boston University*, 891 F 2d 337 (CA 1 1989), *cert den* 496 US 937 (1990); *Runyon v Robinson*, 149 F 3d 507, 513 (CA 6 1998).

In this case, it is difficult to imagine evidence more probative of Ford's and Gross's discriminatory intent than the fact that the company has *never* believed a woman who made a charge against Bennett. Under the circuit court's ruling, however, Ford can claim that it made an unbiased decision on the sole charge that it had against Bennett—and Maldonado would be denied the evidence she needs to prove that was untrue and that

Ford never believed any woman who files a charge against Bennett (or any other supervisor).

- B. The evidence is admissible to prove that Ford's policy against sexual harassment is patently ineffective.

Ford claims that it has no liability for Bennett's acts because it has "zero tolerance" for sexual harassment and "effective, designated channel for receiving complaints [of sexual harassment]" (Ford App, at 40-41). The plaintiff disputes both assertions.

As the Third Circuit has held, evidence that *other* supervisors committed repeated acts of sexual harassment is admissible because it demonstrates that "the written sexual harassment policy was ineffective and patently so." As that Court held "...it is hard to imagine evidence more relevant to the issue of whether a sexual harassment policy was generally effective than evidence that male [employees] did not respect it and that female [employees] were not protected by it." *Hurley, supra*, 174 F 3d at 111.

If anything, the evidence here is more relevant than that in *Hurley*, because the evidence offered here shows that the policy was not respected *by the very man who abused the plaintiff*. Unless the plaintiff is to be deprived of any opportunity to respond to Ford's claims that it has "zero tolerance for" and an "effective designated channel" for resolving claims of sexual harassment, the circuit court obviously abused its discretion in excluding evidence that Ford had done nothing about complaints from five other women as to Bennett's abuse.

C. The evidence is admissible to show that Bennett used a common scheme, plan or system.

In *People v Sabin*, the Supreme Court reaffirmed that evidence of similar misconduct by a defendant could be admitted into evidence under MRE 404(b)(1) where “...the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme or system.” *People v Sabin*, 463 Mich 43, 63-64 (2000). *See also People v Hine*, 467 Mich 242 (2002).

In this case, Bennett was in a position of power over his victims, each of whom was not only an employee, but a particularly vulnerable employee. In each case, he perpetrated his assaults when his victim was in an isolated area: he beckoned Elezovic to his car at night in the rail yard; he directed Maldonado to follow him to remote areas; he waited until Perez’s supervisor sent her to his windowless office; he followed Shannon Vaubel into her father’s office; and he assaulted McClements in a cafeteria that he knew was deserted at that time of day. And in each case, when confronted, he claimed that the victim was trying to “get him” for some fanciful reason.

Even Bennett’s physical acts had very distinctive patterns. He forcibly attempted to kiss Vaubel and McClements in almost identical ways; he tendered money for sex to Perez and Cochran; and he approached Elezovic, Perez and Maldonado—as well as the young women in the M-10 incident—with his penis exposed. Especially to Elezovic and Maldonado, his obscene remarks, licking gestures, grabbing of his crotch, and other acts of sexual harassment were practically identical.

With little analysis of the striking similarity of the relationship and of the acts, the circuit court excluded the evidence, claiming that the evidence was offered for “nothing more than to show repeated conduct of the same kind....” (Ford App, Ex R, Tr 6/21, at

42). The circuit court thus failed to recognize that Bennett's sexual abuse—and in particular his abuse of Maldonado, Perez, and Elezovic—evinced a plan, scheme or system *far more* distinctive than the evidence admitted in *Sabin*, or *Hine*, or in this Court's other decisions on MRE 404.

The Court of Appeals did not reach this issue (Ct App Op, at 8-9). If this Court should grant review on the evidentiary questions, it should grant review on whether the proffered evidence was admissible to show a common scheme or plan as well.

VI

IF THIS COURT SHOULD GRANT LEAVE TO APPEAL, THE COURT SHOULD ALSO GRANT LEAVE ON THE QUESTION OF WHETHER THE COURT OF APPEALS AND THE CIRCUIT COURT IMPROPERLY EXCLUDED EVIDENCE THAT FORD KNEW OF AND DID NOTHING ABOUT BENNETT'S USE OF FORD'S CAR TO SEXUALLY HARASS HIGH SCHOOL GIRLS ON I-275.

As noted, Judges Kathleen MacDonald and William Giovan entered orders excluding from evidence under MRE 403 and 404 the fact that (1) Ford knew of and did nothing to remedy the fact that Bennett had used Ford's car, entrusted to him for evaluation, to stalk and expose himself to high-school girls on I-275 and that (2) he had been convicted for those acts.

Relying upon the Court of Appeals Opinion in *Elezovic v Ford Motor Company*, 259 Mich App 187, 206-208 (2003), *app lv pending* Sup Ct No 125166, two justices of the Court of Appeals held that the circuit court did not abuse its discretion in excluding

Bennett's *conviction*. The two-judge majority did not, however, rule upon the admissibility of the underlying acts by Bennett and by Ford (Ct App Op, at 7-8).²⁴ Judge White rightly held that *Elezovic* did not control on this issue²⁵ and held that the order excluding the M-10 events should be dissolved and the entire matter remanded to the circuit court for reconsideration in light of the other evidence that the Court of Appeals had held should have been admitted (White Op, at 1-2).

If this Court should grant leave on the question of whether Bennett's harassment of the other women working at Wixom should be admitted—or if it should grant leave in *Elezovic* on that issue—it should also grant leave on whether the M-10 evidence is admissible because it, too, raises the same issues as to what puts a company on notice of a danger of sexual harassment and what makes the company at fault for later harassment perpetrated by the same man.

A. The M-10 evidence is probative as to Ford's respondeat superior liability.

In *Chambers*, this Court held that "...we rely on common-law agency principles in determining whether an employer is liable for sexual harassment committed by its employees." *Id.*, 463 Mich at 311.

For fifty years, however, this Court and the most eminent commentators on the common law of torts and of agency had held that an employer could be found at fault for assaults perpetrated upon business invitees, customers and others on its premises if the

²⁴ The plaintiff submits that the conviction is admissible under *Waknin v Chamberlain*, 467 Mich 329 (2002). But there is a separate issue, unresolved by the appellate court, as to whether the underlying acts are admissible.

²⁵ In *Elezovic*, the Court of Appeals held that the M-10 evidence was not admissible in that case because it found that Elezovic had not given notice. There is, however, no question that Maldonado did give notice and thus no decision on the question of whether the M-10 evidence could be considered in corroboration of or in conjunction with the notice of sexual harassment that Maldonado gave.

employer negligently hired or retained an employee with knowledge of prior misconduct—including even pre-employment and non-work related misconduct. *Hersh v Kentfield Builders, Inc.* 385 Mich 410 (1971); Prosser, *Torts*, 5th ed, at 502; *Restatement Second, Agency*, s 213. Relying upon that precedent, the same panel of the Court of Appeals that decided this case ruled that Ford could be held liable for later acts of sexual harassment perpetrated upon an invitee on its premises because the company had ignored Bennett's prior sexual misconduct, including his misconduct on I-275. *McClements v Ford Motor Company*, Ct App No 243764 (2004), *app lv pending* Sup Ct No. 126276.

If the M-10 evidence is admissible to find Ford “at fault” for common-law torts that Bennett committed upon an invitee, it should clearly be admissible to find Ford at fault for statutory torts that Bennett committed upon a Ford employee in the same plant. In fact, if anything, Ford should have a greater duty under a remedial statute of “manifest breadth” that is to be “liberally construed” in aid of its purpose of ending sexual harassment. *Eide v Kelsey Hayes*, 431 Mich 26 (1988).

In the most analogous precedent under Title VII, the Second Circuit, applying the same common law of agency, has held that a company has a duty to act to prevent sexual harassment in the workplace when it learns that that employee has committed major acts of sexual harassment off-premises and off-duty:

The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims. The district court may have been correct that Delta's ability to investigate was curtailed by the fact that the [earlier] rapes occurred off-duty. It does not follow, however, that the off- duty nature of the rapes absolved Delta of all responsibility to take reasonable care to protect co-workers...

Ferris v Delta Air Lines, Inc., 277 F 3d 128, 137 (CA 2, 2001), *cert den* 537 US 824 (2002).²⁶

If anything, there is a far stronger case for admitting the M-10 evidence here than there was for admitting the analogous evidence in *Ferris* or *Hersh* because in this case Ford had definite knowledge as to Bennett's prior act, because its inaction gave Bennett a definite green light to commit further acts of sexual harassment, and because Ford put Bennett not in a flight attendant or laborer position but in a position as a high-level manager with access to and supervision over women employees working in remote areas of the plant at all hours of night.

In construing the Elliott-Larsen Act more narrowly than the common law—and in declaring that Ford could ignore with impunity knowledge that any parent and any citizen would recognize raised a red flag of danger—the circuit court has abused its discretion and the two judge majority below has failed to correct that abuse of discretion.

B. The M-10 evidence is probative as to the timing and the reason that Maldonado filed complaints over the hostility of the environment at Wixom.

As this Court has held, when a witness learns of another act by the defendant that prompts her to report or take action on sexual abuse by a defendant, evidence of the other act is “probative to refute the defendant’s allegations of fabrication of the charges” and

²⁶ Ford has tried to confine *Ferris* to its facts by claiming that it holds only that a company can receive notice where one of the members of a flight crew perpetrates an off-duty assault upon another member of that crew under the unique circumstances of an overseas layover. Those circumstances were crucial in the Court’s decision to hold Delta liable for the actual assault upon the plaintiff. As the above quotation makes clear, however, they were irrelevant to the Court’s decision that Delta had a duty to act when it learned that the employee had committed major acts of sexual misconduct while he was off-duty. *Ferris*, *supra*, 277 F 3d at 137.

should be admitted so that the "...the fact finder [will not] be left with a chronological and conceptual void regarding the events...." *People v Starr*, 457 Mich 490, 502 (1998).

In this case, Ford has repeatedly argued that Maldonado should not be believed because she did not file a complaint with the company until many months after Bennett first abused her in January 1998. The M-10 evidence is crucial in explaining that chronological void. As described in more detail above, in June 1998, after Bennett exposed himself to her in a parking lot after following her on I-275, Maldonado complained the next day to a UAW Representative and learned that Bennett had done the same thing to minors. At that point, Maldonado scheduled a meeting with her pastor, who told her that the abuse of the minors meant that she had a duty as a Christian to report what Bennett had done:

....when I found out that he had the (sic) 16-year-olds, I went to my pastor and he said, Justine, you need to report it, you need to do something, this man obviously hasn't repented from his sin, he continues in his sin, that you are going to have to do something to report it, that it's your obligation to report it as a Christian.

Dep of Maldonado, R.327, Pl. Brief in Supp Mot to Dissolve Order, at 10 and at Ex 10, p. 205.²⁷

During her summer layoff, Maldonado began reporting what Bennett had done to other UAW officials; when she returned in the fall, she hesitated a while, but then reported it to Ford officials in October 1998.

Despite the fact that Maldonado's knowledge of the M-10 events is crucial in refuting Ford's claimed that she is fabricating her charges, the circuit court rejected the offer because it said that she could still claim that she reported the abuse to Ford because that was when her "trusted advisors"(her ministers) told her to do. But that begs the

²⁷ Maldonado's pastor has confirmed the conversation and the advice.

question as to why Maldonado did not consult her “trusted advisors” (her minister) until July 1998 when she learned of the M-10 abuse of minors by Bennett.

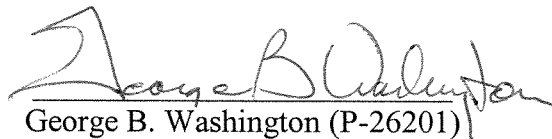
In denying Maldonado a right to respond to a major attack by Ford, the circuit court yet again abused its discretion—and the Court of Appeals has failed to correct that abuse. *Starr, supra*.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the plaintiff requests that this Court deny the application for leave to appeal. In the event, however, that this Court grants Ford’s application for leave, the plaintiff asks that this Court also grant leave on the question of all the purposes for which the testimony of the five other employee victims of Bennett was offered and on the question of whether the circuit court abused its discretion by excluding evidence that Ford knew of and did nothing about the fact that Bennett had used a Ford M-10 car entrusted to him for evaluation to stalk and expose himself to high-school girls on I-275.

By Plaintiff-Appellee and Cross Appellant’s Attys,
SCHEFF & WASHINGTON, P.C.

BY:



George B. Washington (P-26201)
Miranda K.S. Massie (P-56564)
65 Cadillac Square—Suite 3800
Detroit, Michigan 48226
(313) 963-1921

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